Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

HENRY VALERIO,

Petitioner,

vs.

LEND LEASE TRUCKS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court of appeals misinterpreted or misapplied this Court's holdings in *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993) and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) in concluding that proof of a *prima facie* case of age discrimination, coupled with a jury's disbelief of the employer's sole proffered reason for termination, is insufficient to sustain a jury verdict for the Petitioner.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were, as stated in the caption, Henry Valerio, an individual, and Lend Lease Trucks, Inc., a Minnesota corporation.

Lend Lease Trucks, Inc., is a privately held corporation with no parents or subsidiaries.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is not published. It appears as Appendix A, la, *infra*. The order of the United States District Court for the Western District of Pennsylvania dated February 18, 1994 is unreported. It appears as Appendix B, 18a, *infra*. The final amended judgment of the District Court is unreported. It appears in Appendix B, at 22a, *infra*. The Third Circuit's order on Valerio's petition for rehearing en banc appears as Appendix C, 23a, *infra*.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on January 12, 1995. A timely petition for rehearing en banc was filed by Petitioner Valerio on January 23, 1995. The Third Circuit, by order dated March 21, 1995, denied the petition. The order appears in Appendix C, 23a, *infra*. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act (ADEA) (1967, as amended), 29 U.S.C.A. §§ 623, 626 (1985) are reproduced at Appendix D, 25a, *infra*.

STATEMENT OF THE CASE

A. Procedural History

In a single count complaint of age discrimination, Petitioner Henry Valerio alleged that he was terminated from his position as service manager at Lend Lease Trucks, Inc.'s Pittsburgh, Pennsylvania facility. Lend Lease maintained that the sole reason for the termination was for poor job performance. After Lend Lease's motion for summary judgment was denied, the case proceeded to jury trial. At the conclusion of all the evidence Lend Lease moved for judgment as a matter of law (Fed. R. Civ. P. 50(a)) which was denied. The jury, on special interrogatories, found that Lend Lease had wilfully violated the ADEA and awarded damages of $125,000 which were thereafter doubled by the court based on the jury's finding of wilfulness.

Lend Lease filed an appeal on the denial of judgment as a matter of law, denial of its motion for a new trial and evidentiary issues; Valerio filed a protective cross-appeal on evidentiary

issues. The Third Circuit held that the district court erred in denying Lend Lease's motion for judgment as a matter of law, did not consider Lend Lease's other points, and found no abuse of discretion by the trial court in connection with the evidentiary issues raised by Valerio. A timely petition for rehearing en banc was denied on March 21, 1995. This petition for a writ of certiorari seeks review of the Third Circuit's non-published opinion and order, presenting the question whether the court of appeals misinterpreted or misapplied *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993) and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) to the facts of this case.

B. The Circuit Proceedings

The issue joined at trial was whether or not two of Valerio's supervisors, Mr. Dezarn and Mr. DuPuy, presented a pretextual reason of alleged poor job performance as the sole justification for Valerio's termination. The panel opinion below, without a single citation to the full trial record which was before it, held in discussing the pretext question that Valerio failed to offer "any evidence of pretext or direct evidence of discrimination" (Appendix A at 7a, *infra*). The court concluded that Lend Lease had introduced "overwhelming evidence of poor performance" (Appendix A at 8a, *infra*) and that Valerio's reliance on his own testimony and the cross-examination of Lend Lease's witnesses "provided no evidence of pretext" (*id.* at 9a).

Valerio chose at trial to rely on the cross-examinations of Lend Lease's witnesses, and his prima facie case, because those cross-examinations discredited each and every citation of alleged poor performance raised by his supervisors, and thus his evidence fit squarely within the language and impact of the *Hicks* and *Patterson* opinions of this Court.

REASONS FOR GRANTING THE WRIT

In *Hicks,* this Court ruled that while disbelief of an employer's asserted reasons for termination does not *compel* judgment for the plaintiff, the jury may reject the proffered reason, and coupling that rejection with the elements of a prima facie case, reach a legally sustainable finding of discrimination *(Hicks, supra,* __ U.S. __, 113 S. Ct. 2749, n.4).

The Petitioner, through the cross-examination of the defense witnesses, provided ample basis for the jury to have not only a "suspicion of mendacity" (*id.*) but also to conclusively determine that Lend Lease's witnesses were lying. The Third Circuit ignored the *Hicks* opinion's teaching that the jury, having rejected the defendant's sole proffered reason for its action, was permitted "to infer the ultimate fact of intentional discrimination" (*id.* at 2749) and, that "upon such rejection, no additional proof of discrimination is required" (*id.*): such rejection of the employer's reason *and* the conclusion the jury may draw from the elements of the prima facie case are sufficient standing alone to sustain a finding of intentional discrimination.

The panel opinion below substituted its own interpretation of the cross-examinations for that of the jury and usurped the jury's role as fact-finder on the issue of witness credibility. In so doing, the court of appeals ignored the explicit language in *Hicks* which permits a plaintiff to rely solely on the elements of his prima facie case *and* the fact-finder's rejection of the defendant's sole proffered reason for its action, which, without more, *permits* the jury to infer the ultimate fact of intentional discrimination, and thus find that intentional discrimination was the real motivation for the employer's action.

This Court has emphasized that a discrimination plaintiff

> may not be forced to pursue any particular means of demonstrating that [the employer's] stated reasons are pretextual.

Patterson v. McLean Credit Union, 491 U.S. 164, 168 (1989) and that the plaintiff must be free to select from among "various ways", both direct and circumstantial, to prove intentional discrimination (*id.*).

The panel opinion, while paying apparent heed to the *Hicks* evidentiary formulation (Appendix A at 5a, 6a) went beyond the *Hicks* requirements and determined that the Petitioner could only prove pretext by offering "evidence of pretext or direct evidence of discrimination" (Appendix A at 7a). Such a demand goes far beyond what this Court has required of plaintiffs in its *Hicks* and *Patterson* holdings. Mendacity *alone* may prove the pretext, and, when coupled with the prima facie case, plaintiff carries the burden of proof, if the jury chooses to accept that evidence, as this jury did.

Petitioner respectfully points out to the Court that a virtually identical formulation of the question presented herein was raised in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994) which is pending a hearing en banc in September, 1995 before the Fifth Circuit. The Equal Employment Opportunity Commission (EEOC) has filed an amicus brief in that case to prevent "the unwarranted dismissal of meritorious claims of employment discrimination" with consequent impact on the Commission's enforcement efforts. In this case, Petitioner Valerio submits that the Third Circuit's opinion, while unpublished, will unless reversed, work a terrible mischief in age discrimination cases in that circuit generally, and deprive him of a hard-fought and merited jury finding in his favor which verdict was consistent with the opinions of this Court in *Hicks* and *Patterson*.

CONCLUSION

For all of the above reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 12, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3136/3164/3268/3297

Henry Valerio,

Appellee

v.

Lend Lease Trucks, Inc.,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania District Judge: Honorable Glenn E. Mencer
(D.C. No. 90-1358)

Argued December 20, 1994

Before: GREENBERG, SAROKIN, and WEIS, *Circuit Judges*

(Opinion filed January 12, 1995)

Appendix A

OPINION OF THE COURT

SAROKIN, *Circuit Judge:*

The question presented is whether the evidence in the record supports plaintiff's contention that the facially legitimate reasons proffered by the defendant-employer for the discharge of plaintiff were a pretext for discrimination based on his age. We conclude that the evidence in the record does not support the plaintiff's contention. Accordingly, we conclude that the district court erred in denying defendant's motion for judgment as a matter of law at the close of all the evidence, and thus reverse and remand for entry of judgment for defendant.

I.

Henry Valerio ("Valerio") brought an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, against his former employer, Lend Lease Trucks, Inc. ("Lend Lease"). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The jury returned a verdict in Valerio's favor, and judgment was entered in the amount of $250,000.00. Lend Lease filed a timely notice of appeal, and Valerio filed a notice of cross-appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In 1984, Valerio was hired by Lend Lease, a truck rental and leasing company, as the service manager of its Pittsburgh facility. At the time he was hired, Valerio was 54 years old. Plaintiff worked in his position for four years and then was discharged.

Appendix A

Valerio filed a complaint alleging that Lend Lease violated the ADEA by terminating him from his position as service manager because of his age. The ADEA provides:

> It shall be unlawful for an employer — (1) . . . to discharge any individual . . . because of such individual's age.

29 U.S.C. § 623(a)(1) (1985). A jury found that Lend Lease had wilfully violated the ADEA and awarded Valerio $125,000.00 in back pay. The district court doubled that amount based on the jury's finding of wilfulness.

On appeal, Lend Lease assigns five points of error: the district court (1) erred in denying Lend Lease's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a); (2) abused its discretion in failing to grant a new trial on the basis that the verdict was against the weight of the evidence; (3) abused its discretion in excluding evidence that plaintiff was fired from an identical position by a prior employer for unsatisfactory performance; (4) abused its discretion in excluding evidence of the E.E.O.C.'s no probable cause determination; and (5) erred in awarding certain damages as part of its front pay award.

We hold that the district court erred in denying Lend Lease's motion for judgment as a matter of law. As a result of this determination, we need not consider the merits of Lend Lease's remaining arguments. In his cross-appeal, Valerio argues that: (1) in the event of a remand, certain evidentiary and legal rulings by the district court must be corrected; (2) cross-appellant should have been awarded damages for future lost social security payments and other relief. Likewise, we need not reach the jury charge and damages issues raised on cross-appeal, as we will not remand for retrial. However, in the course of examining the basis

for the jury's verdict, we will consider the evidentiary issues raised in plaintiff's cross-appeal.

III.

Following the introduction of all the evidence, Lend Lease moved for judgment as a matter of law. *See* Fed.R.Civ.P. 50(a). The district court denied Lend Lease's motion. We exercise plenary review of the district court's order granting or denying a motion for judgment as a matter of law and apply the same standard as the district court. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993).

"Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d at 1166. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978) (citations omitted). Specifically, in an ADEA case, this court has held that "our standard requires consideration of whether or not there is substantial evidence in the record to support an employee's contention that ' "but for" his age he would not have been discharged.' " *Seman v. Coplay Cement Co.* ("*Seman*"), 26 F.3d 428, 431 (3d Cir. 1994) (citing *Billet v. CIGNA Corp.*, 940 F.2d 812, 815 (3d Cir. 1991)).

The ADEA prohibits discrimination in employment against an individual over age 40 because of that individual's age. Under the ADEA, a plaintiff must first prove a prima facie case of discrimination. A "pretext plaintiff does not face an onerous hurdle in establishing a prima facie case as he may rely on either

circumstantial evidence or on direct evidence of discrimination." *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir.) *cert. denied*, __ U.S. __, 114 S. Ct. 186 (1993) (citations omitted). In *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171 (3d Cir. 1988), we explained that to establish a prima facie case of age discrimination under the ADEA, plaintiff must prove that (1) he belongs to the protected class; (2) he was performing satisfactorily in his present position and was actually or constructively dismissed; (3) that a person sufficiently younger was employed in his stead. *Id.* at 173.

In a pretext case, (i.e. where the employee argues that the nondiscriminatory reasons proffered by the employer are false), such as this one, we follow the evidentiary procedure set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The evidentiary scheme was refined in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and recently clarified in *St. Mary's Honor Ctr. v. Hicks* ("*Hicks*"), __ U.S. __, 113 S. Ct. 2742 (1993).

Applying the *McDonnell Douglas* scheme in *Seman*, 26 F.3d at 432, we explained that once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. 26 F.3d at 432. If the employer meets this burden of production, then the presumption of discriminatory intent created by the plaintiff's prima facie case is rebutted and the presumption drops from the case. *Id.* The employee always bears the ultimate burden of persuasion. *Id.*

A plaintiff who claims discrimination but lacks direct evidence of discriminatory animus must point to evidence tending to show that the defendant's explanation is pretextual

since the presumption arising from the prima facie case no longer exists. *Armbruster v. Unisys Corp.* ("*Armbruster*"), 32 F.3d 768 (3d Cir. 1994). The plaintiff can prove pretext by showing that the employer's nondiscriminatory reason was either unworthy of credence or otherwise did not actually motivate the employment decision. *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir. 1994). Furthermore, in *Armbruster,* this court noted that, after the Supreme Court's decision in *Hicks,* it is clear that in a pretext case a plaintiff must both establish a prima facie case and prove pretext in order to meet its burden of showing intentional discrimination:

> it seems clear . . . that the trier of fact cannot find for the plaintiff merely because it disbelieves the defendant's proffered explanation; it must also be persuaded that the employment decision was the result of the bias that can be inferred from the falsity of the defendant's explanation. Therefore, we believe an ultimate finding of illegal discrimination in a pretext case requires evidence showing a prima facie case and evidence showing pretext. Each is necessary, and a plaintiff's proof is insufficient unless both are shown.

Armbruster, 32 F.3d at 783 (citations omitted). *See also Seman,* 26 F.3d at 433.

In the instant case, Valerio is in the protected class because he was over age 40 when he was discharged and has presented evidence that his replacement was 27 years younger than he. On appeal, Lend Lease argues that Valerio failed to meet his burden

of showing that he was performing satisfactorily in his present position, and, as a result, never established a prima facie case of age discrimination.

However, in *Billet v. CIGNA Corp.*, this court noted that once a case has been tried to a jury on its merits, it is unnecessary for an appellate court to decide whether a prima facie case was established. 940 F.2d at 816 (citing *Bruno v. W. B. Saunders Co.*, 882 F.2d 760, 764 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990)). "Where the defendant has done everything that would be required of him if the plaintiff had made out a prima facie case, whether the plaintiff really did so is no longer relevant." *Bruno v. W. B. Saunders Co.*, 882 F.2d at 764 (quoting *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). Rather, the reviewing court must consider whether the plaintiff has sustained his ultimate burden. *Bruno v. W. B. Saunders Co.*, 882 F.2d at 764. *See also Billet v. CIGNA Corp.*, 940 F.2d at 816.

Moreover, we need not determine whether there was sufficient evidence in the record to support a finding that the elements of the prima facie case had been established because we hold that plaintiff has failed to offer any evidence of pretext or direct evidence of discrimination. Thus, even assuming plaintiff proved the elements of his prima facie case, this alone would not be sufficient to overcome defendant's motion for judgment as a matter of law.

In this appeal, Lend Lease argues and we agree that Valerio offered no evidence from which a reasonable jury could have found pretext. In response, Valerio contends that the jury could have reasonably found pretext based on the testimony elicited during the cross-examination of defense witnesses, DeZarn and DuPuy. Valerio concludes that the jury properly inferred

intentional discrimination from his alleged showing of pretext in combination with the evidence establishing a prima facie case.

Lend Lease introduced overwhelming evidence of poor performance, a nondiscriminatory reason for Valerio's termination. Lend Lease produced evidence that all four of Valerio's supervisors, a co-worker, and a subordinate believed his performance was unsatisfactory. These witnesses furnished specific examples of Valerio's poor performance, testifying that: he failed to meet industry and company standards for the number of trucks overdue for preventive maintenance; his poor management of the shop resulted in excessive overtime expenses; he exercised poor decisionmaking regarding repairs; he failed to provide mechanics with parts on a timely basis; he failed to respond to his supervisor's requests for information in a timely manner; he failed to purchase a sufficient percentage of parts from the company's National Accounts Program; he failed to forecast needs and expenditures accurately; he failed to ensure that staff affixed the necessary permits and licenses to trucks; and his slow maintenance resulted in customer dissatisfaction.

Lend Lease also introduced two performance reviews. The first indicated that Valerio's performance was good. However, the second and final performance review, conducted a year later, noted "a significant erosion in [Valerio's] performance since his last review." In this final review, Valerio's supervisor rated Valerio as "marginal" in "decisionmaking, planning, communicating, and development of personnel" and gave him the lowest of three ratings in the categories of "creativity, judgment, leadership, and self-confidence." Additionally, Lend Lease introduced memos, which described specific incidents of poor performance, written to the file by one of Valerio's supervisors.

Appendix A

After Lend Lease produced extensive evidence of a nondiscriminatory reason for Valerio's discharge, the burden of production shifted back to Valerio to prove that the reasons presented by Lend Lease were merely a pretext for age discrimination. Valerio failed to produce a single witness in a position to evaluate his performance who could testify that he was performing his job satisfactorily. Additionally, Valerio failed to produce a single witness who could testify that, at the time he was discharged, his supervisors believed his performance was satisfactory. Instead, at trial and on appeal, Valerio relied on his own testimony and the cross-examination of Lend Lease's witnesses to establish pretext.

At trial, Valerio testified that he was performing satisfactorily and denied being counseled or warned of performance problems. However, the ADEA does not require an employer to counsel or warn an employee of performance problems. *See Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1216 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Bergfeld v. Muralo Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1536 (D.N.J. 1993) ("failure to notify does not justify an inference of discrimination"); *Retter v. Georgia Gulf Corp.*, 755 F. Supp. 637, 643 (D.N.J. 1991), *aff'd without op.*, 975 F.2d 1551 (3d Cir. 1992); *Pierce v. New Process Co.*, 580 F. Supp. 1543, 1545 (W.D. Pa.), *aff'd without op.*, 749 F.2d 27 (3d Cir. 1984). More importantly, "[plaintiff's] view of his performance is not at issue; what matters is the perception of the decisionmaker. The fact that an employee disagrees with an employer's evaluation of him does not prove pretext." *Billet v. CIGNA Corp.*, 940 F.2d at 825 (citations omitted).

Additionally, Valerio's cross-examination of defense witnesses provided no evidence of pretext. Valerio relies on the

cross-examinations of two of his supervisors, DeZarn and DuPuy, but this court concludes that both witnesses supplied numerous legitimate business reasons for firing Valerio and their cross-examinations supplied no evidence of pretext. Moreover, all of the remaining defense witnesses who were in a position to observe Valerio's performance similarly testified that his performance was unsatisfactory and cited to some of the same problems highlighted by DeZarn and DuPuy, and their testimony was unrebutted.

To rebut the testimony of several defense witnesses that truck drivers complained about the service they received while Valerio was service manager, Valerio introduced two affidavits from officials at Calgon Corporation and Calgon Carbon. The affiants stated that they had never complained to Lend Lease about plaintiff. This evidence is insufficient to show that the defense witnesses were lying about the existence of customer complaints, because complaints could have come from other employees at Calgon Corporation or Calgon Carbon or from Lend Lease's other customers. Moreover, even viewing the evidence in the light most favorable to Valerio by assuming that the affidavits proved that there were no customer complaints about Valerio, the numerous other proffered examples of his poor performance went unrebutted. *See Connell v. Bank of Boston*, 924 F.2d 1169, 1177 (1st Cir.), *cert. denied*, 501 U.S. 1218 (1991) (plaintiff's evidence not sufficient to permit inference of age discrimination because although plaintiff's evidence may have been sufficient to rebut one nondiscriminatory reason proffered by employer, plaintiff did not offer evidence to show that employer's other reasons were pretextual). *See also Fuentes v. Perskie*, 32 F.3d at 764 (to avoid summary judgment, evidence rebutting employer's proffered reasons for termination must allow a factfinder reasonably to infer that each of employer's proffered nondiscriminatory reasons was pretextual).

Valerio also relies on a comment made by his supervisor, DeZarn, who allegedly stated that Valerio was "too set in his ways." In light of the overwhelming evidence of a nondiscriminatory reason for firing Valerio, no reasonable jury could have relied on this isolated, ambiguous comment to support a finding of age discrimination or pretext. *See Perry v. Prudential-Bache Secur., Inc.*, 738 F. Supp. 843, 853 n.5 (D.N.J. 1989), *aff'd without op.*, 904 F.2d 696 (3d Cir. 1990), *cert. denied*, 498 U.S. 958 (1990) (comments which could be construed as age-related not sufficient to discredit legitimate motives put forth by employer as reasons for discharge).

Finally, Valerio introduced evidence that there was a 27-year age difference between him and his replacement. Although this evidence is helpful in establishing a prima facie case, it is insufficient to show pretext or age discrimination. *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 658-659 (7th Cir. 1991); *Little v. Republic Refining Co.*, 924 F.2d 93, 98 (5th Cir. 1991); *Kier v. Commercial Union Ins. Cos.*, 808 F.2d 1254, 1258 (7th Cir.), *cert. denied*, 481 U.S. 1029 (1987).

In *Billet v. CIGNA Corp.*, we affirmed the district court's granting of a directed verdict in favor of defendant because there was not "enough evidence . . . for a jury to make a finding of pretext." 940 F.2d at 814. We noted that "there was simply too much *objective* evidence of problems with Billet's performance to make his claim of pretext plausible." *Id.* at 828. Moreover, we cited to ADEA cases in which the reviewing court held that a jury's verdict could not stand. *Id.* at 816-17. Finally, we stressed that:

> [a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an

> employment decision. Without some evidence to cast this doubt, this court will not interfere in an otherwise valid management decision. To require less would be to expose to litigation every management decision impacting on a protected party.

Id. at 828.

In sum, Valerio presented no more than a scintilla of evidence that age, not the reasons proffered by Lend Lease, was the grounds for his discharge. Accordingly, the district court should have entered judgment as a matter of law in favor of Lend Lease.

IV.

We now turn to whether the district court erred in excluding certain evidence, since that evidence might have eliminated the deficiencies found above. In his cross-appeal, Valerio maintains that the district court improperly excluded evidence of a "separation agreement" and evidence that two other employees in the protected class were replaced by younger successors. Lend Lease maintains that the evidence was properly excluded and also challenges Valerio's standing to cross-appeal.

A "party has no right to appeal from a favorable judgment." *Dalle Tezze v. Director, Office of Workers' Compensation Programs*, 814 F.2d 129, 133 (3d Cir. 1987). As Justice Brandeis explained, however, an appellee may raise any argument in defense of a district court order, "although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United*

States v. American R. Express Co., 265 U.S. 425, 435 (1924). Moreover, a party may undertake a "protective" or "conditional" cross-appeal "so that if the main appeal results in modification of the judgment his grievances will be determined as well." *Hartman v. Duffy*, 19 F.3d 1459, 1465 (D.C. Cir. 1994). Whether in opposition to the direct appeal or on cross-appeal, plaintiff is entitled to raise the evidentiary issues.

We review the district court's rulings on the admissibility of evidence for abuse of discretion. *Glass v. Philadelphia Electric Co.*, 34 F.3d 188, 191 (3d Cir. 1994).

The district court excluded evidence that Lend Lease had conditioned its offer of a severance package on Valerio's execution of a release of all claims against the company (the "separation agreement"), and that Lend Lease had not presented any similar agreement to three other older employees terminated close in time to Valerio.

Rule 408 of the Federal Rules of Evidence generally prohibits the admission of evidence relating to settlement offers. In evaluating severance packages conditioned on a waiver of claims in the employment discrimination context, the Ninth Circuit has held that Rule 408 will exclude separation agreements offered after termination, but that offers made contemporaneous with the termination may be admissible. *See Cassino v. Reichhold Chemicals. Inc.* ("*Cassino*"), 817 F.2d 1338, 1343 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988) (separation agreement offered upon termination not excluded by Rule 408); *Mundy v. Household Finance Corp.* ("*Mundy*"), 885 F.2d 542, 546 (9th Cir. 1989) (separation agreement offered after termination excluded by Rule 408). Employing the reasoning of *Cassino* and *Mundy*, Valerio argues that because there was no dispute pending

between the parties when the separation agreement was offered, it is beyond the reach of Rule 408.

The Third Circuit has not adopted the Ninth Circuit's temporal distinction, but we recognize the fact-specific nature of the inquiry. The district court here considered when the agreement was offered and when the dispute began. *See* J.A. at 444-45. Certainly some portions of the separation agreement presented to Valerio resemble a severance package, and others appear more like an offer to settle potential claims. We acknowledge the district court's substantial discretion over evidentiary matters and conclude it did not abuse its discretion by excluding the separation agreement.

Valerio argues further that the district court abused its discretion by excluding evidence that two other older employees were terminated and replaced by younger persons. The district court stated "we are going to try this case on why this man was let go, not why other people were let go." J.A. at 238. One of the two employees was 42 when discharged, barely within the protected class. According to Lend Lease's proffer, as to the other, DeZarn, would have testified that age was not a factor in his termination. *See* J.A. at 234-35. In addition, the experience of two other employees is too small a statistical sample to indicate a pattern and practice of discrimination. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 121-22 (2d Cir. 1984). We conclude that the district court did not abuse its discretion by excluding evidence concerning the circumstances of the terminations of these two employees.

V.

At his trial, Valerio was given a full opportunity to be heard

on the issue of pretext. Nevertheless, Valerio failed to introduce more than a scintilla of evidence that the legitimate, nondiscriminatory reasons for his discharge proffered by all of his supervisors, a co-worker, and a subordinate were false or otherwise did not actually motivate Lend Lease's actions. Moreover, Valerio failed to present any direct evidence of age discrimination. Because the evidence in the record does not support Valerio's contention that the reasons for his discharge were pretext and that "but for" his age he would not have been discharged, the district court erred in denying Lend Lease's motion for judgment as a matter of law. We, therefore, will reverse the April 28, 1994 final amended judgment entered by the district court, and remand for the district court to grant Lend Lease's motion for judgment as a matter of law in accordance with this decision.

TO THE CLERK:

Please file the foregoing Opinion

s/ H. Lee Sarokin
Circuit Judge

DATED: January 12, 1995

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-3136, 94-3164, 94-3268 & 94-3297

HENRY VALERIO, Appellant in Nos. 94-3164 and 94-3297

vs.

LEND LEASE TRUCKS, INC., a Minnesota Corporation

LEND LEASE TRUCKS, INC., Appellant in Nos. 94-3136 & 94-3268

On Appeal from the United States District Court for the
Western District of Pennsylvania
(D.C. Civil No. 90-1358)
Present: GREENBERG, SAROKIN, and, WEIS *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and were argued by counsel December 20, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 25, 1993, as modified by orders entered February 18, 1994, and April 28, 1994, be, and the same is hereby reversed and the cause remanded to the said District Court to grant Lend Lease's motion for judgment as a matter of law pursuant to the Opinion of this Court. Costs taxed against cross-appellant Valerio. All of the above in accordance with the opinion of this Court.

Appendix A

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: January 12, 1995

APPENDIX B — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 18, 1994 AND APRIL 28, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 90-1358

JURY TRIAL DEMANDED

Judge Glen E. Mencer

HENRY VALERIO,

Plaintiff,

v.

LEND LEASE TRUCKS, INC., a Minnesota corporation,

Defendant.

ORDER

AND NOW, to wit, this 18th day of February , 1994, upon consideration of the Defendant's Motion for Judgment as a Matter of Law or in the Alternative, for a New Trial, it is hereby ORDERED that the Defendant's Motion for Judgment as a Matter of Law is denied; It is FURTHER ORDERED that the Defendant's Motion for a New Trial is denied; and it is FURTHER ORDERED that the Stay of Proceedings to Enforce or Execute Judgment is dissolved and withdrawn.

Appendix B

By the Court:
s/ Glenn E. Mencer

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1358

HENRY VALERIO,

Plaintiff

v.

LEND LEASE TRUCKS, INC., a Minnesota corporation,

Defendant

ORDER

AND NOW, this 18th day of February, 1994, upon consideration of the Plaintiff's Motion for Injunctive and Equitable Relief, IT IS HEREBY ORDERED that the judgment entered against the Defendant on October 25, 1993 in the amount of $250,000.00 is modified by adding thereto:

(a) an award of $55,152.60 for "front pay";

(b) an award of $7,017.51 for hospitalization premiums;

(c) an award of attorney fees in the amount of $27,450.00;

(d) an award of costs in the amount of $3,438.00.

IT IS FURTHER ORDERED that the Defendant shall reinstate the Plaintiff in its employees' pension plan, making past

company contributions relative to the Plaintiff for the period from November 1988 through September 1993 and shall continue company contributions relative to the Plaintiff from October 1993 through September 5, 1995; Defendant shall reinstate the Plaintiff, and his spouse, to full medical coverage as provided for its current employees, and make Plaintiff and his spouse eligible for "retiree coverage as of September 6, 1995; Defendant shall insure the Plaintiff's life for an amount equal to the life insurance provided for Mr. Rick Stough and shall keep the said insurance in full force and effect through September 5, 1995 at which time Plaintiff shall be insured in such fashion as is normal and regular for its retirees. Plaintiff shall pay any "co-pay" for health and life insurance normally paid by active or retired employees of the Defendant.

Defendant shall refrain from any action or conduct which discriminates against the Plaintiff on the basis of his age or retaliate against the Plaintiff for his litigation of his claim against the Defendant.

s/ Glenn E. Mencer
United States District Judge

cm: Counsel of record *AMW*

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 90-1358

JURY TRIAL DEMANDED

Judge Glenn E. Mencer

HENRY VALERIO,

Plaintiff,

v.

LEND LEASE TRUCKS, INC., a Minnesota corporation,

Defendant.

ORDER

AND NOW, to wit, this 28th day of April, 1994, upon Motion of the Plaintiff pursuant to Rule 59(e) it is hereby ORDERED that interest at the rate of 3.38 percent per annum shall be added to total amount of the judgment awarded the Plaintiff against the Defendant as reflected in this Court's Orders of October 25, 1993 and February 18, 1994 until such time as the judgments are paid and satisfied in full.

By the Court:

s/ Glenn E. Mencer
Senior United States District Judge

APPENDIX C — ORDER ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3136/3164/3268/3297

Henry Valerio,

Appellee

v.

Lend Lease Trucks, Inc.,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Judge: Honorable Glenn E. Mencer
(D.C. No. 90-1358)

Argued December 20, 1994

BEFORE: Sloviter, *Chief Judge,* Becker, Stapleton, Mansmann, Greenberg, Scirica, Hutchinson, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Sarokin, *Circuit Judges.*

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by Henry Valerio in the above-entitled case having been submitted to the judges who

participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ H. Lee Sarokin
Circuit Judge

Dated: March 21, 1995

APPENDIX D —AGE DISCRIMINATION IN EMPLOYMENT ACT, AS AMENDED 29 U.S.C. § 623 AND 29 U.S.C. § 626

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

Appendix D

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.